

LETTER OPINION
2005-L-34

October 13, 2005

Ms. Rhonda Ehlis
Dunn Center City Attorney
PO Box 570
Dickinson, ND 58602-0570

Dear Ms. Ehlis:

A resident of Dunn Center gifted by quit claim deed an apartment building to the city. The deed contained no restrictions on the apartment or income from the apartment. A separate document signed by the donor provided that the city was to rent the apartments at a "fair price," pay the caretakers a "fair price for their work," and was not to use any of the income for "sports of any kind." There were no other direct restrictions¹ on using the remaining income from the apartments. You ask whether the city has the authority to operate the apartment building as a "for-profit" rental business. You also ask whether using the income to reduce property taxes or renting the apartments below fair market value would implicate the constitution's anti-gift clause; and about the tax consequences of owning and operating the apartments.

It is my opinion that: (1) the city may operate the apartment building to generate income for the city provided the property and income are administered in accordance with any conditions or terms of the grant and the income is used for purposes within the city's statutory authority; (2) a condition attached to the grant prohibits the city from renting the apartments below fair market value; (3) using the income to directly reduce property taxes would violate the constitution's anti-gift clause; and (4) the apartment building and income are generally exempt from taxation.

ANALYSIS

"A city is a creature of statute and it has only such authority as is given to it by statute or necessarily implied therefrom." Kirkham, Michael & Associates v. City of Minot, 122

¹ The separate document specifically permits the income to be used for street improvements and water projects, as well as to decrease the city mill levy.

N.W.2d 862, 863 (N.D.1963); Harding v. City of Dickinson, 33 N.W.2d 626, 629 (N.D. 1948); Trinity Hospital Association v. City of Minot, 76 N.W.2d 916, 918 (N.D. 1956).

Section 1-08-04, N.D.C.C., gives cities the authority to accept gifts and administer them on behalf of the city. That section provides:

Devises, legacies, bequests, and gifts may be lawfully made to the state or any county, township, city, school district, or park district of the state of North Dakota. The title to any property that is devised, bequeathed, or given to the state, or to any such county, township, city, school district, or park district, for the use and benefit thereof, vests in the state or such county, township, city, school district, or park district, to be by it held in trust under the terms and conditions provided for in the devise, legacy, bequest, or gift. Unless otherwise authorized by the will or other instrument providing for the devise, legacy, bequest, or gift, no part of the property, nor of the income therefrom, may be diverted or used for any other purpose. The officers charged with the management of the fiscal affairs of the state may only accept and receive a devise, legacy, bequest, or gift that is consistent with the statutory responsibilities of the specific officer involved. The officers charged with the fiscal management of any county, township, city, school district, or park district, may accept and receive any such devise, legacy, bequest, or gift. The officer who accepts and receives the devise, legacy, bequest, or gift shall administer the same for and on behalf of the state, or any such county, township, city, school district, or park district.

N.D.C.C. § 1-08-04 (emphasis added). See also N.D.C.C. § 40-05-01(55) (authority of city to acquire and hold real and personal property by gift).

Unlike the state, which can only accept a gift or bequest that is consistent with the statutory responsibilities of the specific officer involved, cities may accept and administer any gift² provided it is not contrary to public policy. N.D.A.G. Letter to Nagel (Jan. 9, 1989). A gift for the benefit of indefinite numbers of persons by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government is a “legal” charity. Powers v. Home for Aged Women, 192 A. 770, 773 (1937).

There is no limitation on the kind of property that may be gifted to a city. Thus, a gift may include real property. The officer who accepts the gift must administer it on behalf of the city in accordance with terms or conditions of the gift. N.D.C.C. § 1-08-04. The

² N.D.C.C. § 1-08-04.

fact that a public entity administers a gift of land does not necessarily mean that it is in the for-profit rental business. Rather, it is administering the gift for the benefit of the public entity. That the gift is one of real property rather than a gift of cash or other more liquid assets is irrelevant. It is my opinion that the city may accept and administer the gift of the apartment building and use the income for the benefit of Dunn Center residents subject to the conditions attached to the gift.

You asked whether the city could use income from the apartments to care for the property. As noted above, the donor stated that the city was to pay the caretakers of the apartments a fair price for their work. Thus, it was the donor's intent that some of the income was to be used for upkeep and maintenance of the building. Therefore, it is permissible to use income from the property for its care and maintenance. To ensure that the income is used, or not used, as the case may be, as provided in the conditions of the grant, the city should ensure that it accounts for the money separately in accordance with generally acceptable accounting practices.

You asked about the tax consequences of a city owning and operating an apartment building. Real property located in North Dakota and owned by a political subdivision is exempt from property taxation. N.D.Const. art. X, § 5; N.D.C.C. § 57-02-08(3); see also N.D.C.C. § 40-01-07 (city money and property are exempt from taxation). Under federal law, income of a political subdivision is exempt from taxation. See e.g. Priv. Ltr. Rul. 88-49-023 (Dec. 9, 1988) ("Generally, the activities of states and their political subdivisions . . . are exempt from federal income tax in accordance with the doctrine of intergovernmental immunity.") Since state income tax generally is based on federal law, and the income is not taxable under federal law, the income will not be taxable under state law either. See International Mineral & Chem. Corp. v. Heitkamp, 417 N.W.2d 791, 794 (N.D. 1987) (under this state's law, federal taxable income is the simplified starting point for computing state income tax); N.D.C.C. § 57-38-01.1 (it is the intent of the legislative assembly to simplify the state income tax laws by adopting the federal definition of taxable income). Therefore, neither the apartment building nor its income is generally subject to taxation.

You also asked whether using the income to reduce property taxes or whether renting the apartments for less than fair market value to low income persons would violate the anti-gift clause of the constitution. Article X, Section 18 of the North Dakota Constitution provides:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support

of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

As noted above, the conditions to the gift require the city to rent the apartments “at a fair price” and to pay the caretakers of the apartment “a fair price for their work.” A “fair price” means fair value or fair market value. See The American Heritage Dictionary 486, 983 (2d coll. ed. 1991) (“fair” means free of favoritism or bias; just or equitable) (“price” means the cost of something; its value or worth); Black’s Law Dictionary 1549 (7th ed. 1999) (“fair value” is synonymous with “fair market value”; “fair market value” means the price a seller is willing to accept and a buyer is willing to pay on the open market and in an arm’s-length transaction). The condition to rent “at a fair price” prohibits the city from renting below fair market value. Because I conclude the terms of the grant would prohibit the city from renting the apartments for less than fair market value, it is unnecessary to determine if doing so would violate the anti-gift clause.

With regard to using the income to reduce property taxes, I note that the only prohibition in the document prevents the city from using any of the income for “sports of any kind.” The remaining income is to be used to benefit the residents of Dunn Center. There are no other direct restrictions on how the city may use the remaining income. Therefore, that income, is “public” money subject to the North Dakota Constitution’s anti-gift clause, N.D. Const. Art. X, § 18. N.D.A.G. 2003-L-31.³

This office previously addressed an issue similar to the issue presented here, which is whether the city can use the income from the apartments to reduce property taxes. In N.D.A.G. 93-L-292, the question was whether a city could use sales tax revenues to fund tax credits for individual property taxpayers. The opinion states that “using revenues from the city sales tax to reduce individual property taxes in the manner proposed would have the effect of transferring to property owners money held for all the people of the city, not just property owners.” (Citing Solberg v. State Treasurer, 53 N.W.2d 49, 53-54 (N.D. 1952).) The opinion concluded that “[s]ince it does not appear the transfers would be made in connection with the city’s engaging in a permissible utility, business, or enterprise, . . . such transfers would violate Article X, Section 18 of

³ The Legislature in N.D.C.C. § 21-04-01(5) has rather broadly classified what funds are “public” by including “all funds derived from taxation, fees, penalties, sale of bonds, or from any other source, which belong to and are the property of a public corporation or of the state, and all sinking funds of such public corporation or of the state, and all funds from whatever source derived and for whatever purpose to be expended of which a public corporation or the state have legal custody.” N.D.A.G. 2003-L-31. In that opinion, this office stated that a gift to the city of Stanley consisting of a church building and \$40,000, with no legal limitations on what the city could do with the church and the money, were “public” funds or resources.

the North Dakota Constitution.” N.D.A.G. 93-L-292. See also N.D.A.G. 2005-L-30. Similarly here, using the income to directly reduce property taxes would have the effect of transferring to property owners income held for all residents of Dunn Center. It is my opinion that such a transfer would violate the anti-gift clause of the constitution.⁴

Sincerely,

Wayne Stenehjem
Attorney General

jak/vkk

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

⁴ As noted earlier, the separate document specifically allows the city to use the income for street improvements and water projects. The city may use the income for any permissible project. To the extent any income remains, N.D.C.C. § 57-15-31 provides “[e]stimated revenues from sources other than direct property taxes” must be deducted from estimated expenditures and reserve funds to determine the property tax mill levy. Thus, this statute requires estimated income from the apartment building, not used for other projects, to be deducted before the property tax levy can be determined. Cf. N.D.A.G. 1993-L-292 (N.D.C.C. § 57-15-31 would require the city to deduct estimated sales tax revenues before the property tax levy could be determined).